1981

The State of Utah v. Ernest Joe Velasquez : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, :

Plaintiff-Respondent, :

-v- :

ERNEST JOE VELASQUEZ, : Case No. 17242

Defendant-Appellant. :

BRIEF OF APPELLANT

Appeal from a judgment and conviction of Second Degree Murder in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Christine M. Durham, Judge, presiding.

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STATEMENT OF THE NATURE OF THE CASE

Appellant was charged by Information with the crime of Second Degree Murder, in violation of Utah Code Ann. Section 76-5-203 (1953 as amended). Trial was held in the Third Judicial District Court on June 2, 1980, through June 9, 1980.

DISPOSITION IN THE LOWER COURT

Appellant was convicted of Second Degree Murder in a jury trial conducted before the Honorable Christine M. Durham. He was sentenced to serve an indeterminate term of five years to life in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of his conviction and a new trial.

STATEMENT OF THE FACTS

Paul Whitehead, the deceased's older brother, was the first to discover his brother's body. He testified that he was contacted by the deceased's employer and asked to check on his brother's whereabouts, who had failed to show for work. (T.55) Paul went to his brother's apartment several times over a three day period, but received no response when he knocked (T. 56-59) He also checked the hospitals and police stations. (T.60) Finally he and Steve Southwood, who lived in an apartment across the hall, gained access to the deceased's apartment through a window. They found Paul's brother lying on the bed with a lamp cord around his neck, and a gunshot wound on his face through his eye. (T.60,63,220) In addition, there were several abrasions on his forehead, which, according to the State Medical Examiner, were probably caused by a blunt instrument (T.226) A piece of wood was against the bed, and there was blood on several walls. (T. 249, 255) Prints lifted from these smears matched appellant's fingerprints. (T.354, 361)

Some time later, officers from Adult Probation and Parole searched appellant's apartment, which was across the hall from deceased's apartment. Appellant resided there with Brenda Valentine and Jessie Garcia. (T. 177) The officers seized an automatic pistol, a magazine, and a box of .22 cartridges. (T. 178, 186-7, 207) The cartridge case taken from the decedent's bed was subsequently compared to test casings fired by the pistol, and the striations were consistent. (T. 332)

Both appellant and Brenda Valentine were thereafter arrested, although charges against Brenda were ultimately dismissed. (T. 278, 657) Appellant was confronted with the fingerprint match,and denied that the prints were his. (T.300) In a statement to the police, Ms. Valentine said that one night appellant came back to the apartment with blood all over him, and said he'd just "dusted" someone. (T. 654)

At trial, Ms. Valentine stated she had lied in her statement to the police, and testified to the following sequence of facts, as did appellant. On Saturday, November 17th, a group of people were drinking, playing guitar, and singing in appellant's apartment. (T. 427, 513) Around 10:30 deceased followed Brenda into the kitchen and, putting his arms around her breasts, told her he was going to "get her and screw her". (T. 515, 517) Brenda shook him loose, and then went in to tell appellant what happened. (T. 431-2, 517) Appellant just advised her to cool down, and some time later, after the deceased had gone, Brenda stated that if appellant "wasn't going to do anything about it, she was". (T. 435, 517) She grabbed a knife and went over to deceased's apartment.(T. 435, 518) The deceased continued to proposition her and grabbed the knife from her. She grabbed back and cut her hands. (T. 521, 522) When she returned and showed appellant what happened, he went over to deceased's apartment to try to talk to him. (T. 523)

Appellant testified that when he entered deceased's apartment, the latter had on a mask with a big nose and bushy eyebrows, and an electrical cord around his neck. (T. 437) (The deceased's brother later testified that he had seen "little kid glasses and nose" when he cleaned out his brother's apartment (T. 504) Deceased said "how do you like my costume for tomorrow party?", and when confronted with cutting Brenda's hands, responded "she's a lying bitch". (T. 438) Appellant then swung at deceased and a scuffle ensued. The deceased hit his head on the corner of the door, and the two wrestled around the room until appellant finally knocked the deceased out. (T. 439, 440) Appellant grabbed the deceased by the cord around his neck and his shirt, and dragged him onto the bed. (T. 441) Brenda then came in with a gun, and as appellant walked out of the bedroom, he heard a shot. (T. 443) Brenda testified that she walked into the bedroom, saw the deceased passed out on the bed, pointed the gun at him, thought about it a minute, then decided "I can't do it," shook the gun, and it went off. (T. 525) She went back to the appellant's apartment and put the gun in a closet. (T. 527)

The jury returned a verdict pronouncing appellant guilty of second degree murder.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN FAILING TO SUPPRESS FRUITS OF AN ILLEGAL SEARCH OF PREMISES OCCUPIED BY PAROLEES.

Counsel for appellant made a pre-trial motion to suppress State's Exhibits 1-5 (Playboy Magazines, .22 caliber pistol, clip, and .22 shells), which were seized during a warrantless search of appellant's and Jessie Garcia's (both parolees) apartment. The motion was denied (T. 171), and appellant asserts that such denial deprived him of his constitutional guarantees under the Utah Constitution, Article I, Section 14, and the United States Constitution, Amendment IV.

The following facts were before the court at the pre-trial motion. Ernest Velasquez (appellant) occupied an apartment across the hall from the deceased's apartment. He had moved there after coming to Utah from New Mexico, where he was on parole. (None of the testifying officers knew what he was on parole for, however. T.34, 116) Jessie Garcia, who was on parole in Utah for rape and murder, was staying temporarily with appellant. (T. 151) During the investigation of the homicide, the police department became suspicious of appellant and Garcia, both because of their parolee status, and the proximity of their residence to the scene of the homicide. (T. 5,6) Having insufficient evidence to obtain a warrant, Police Officer Voyles contacted Dennis Holm, Director of State Parole Services, and inquired as to Adult Probation and Parole's authority to conduct searches of parolees. He suggested it

would be helpful to his investigation if the parole officers could search appellant's apartment. (T. 6,7,19) Subsequently, a warrantless search was conducted by six parole officers which produced the items of evidence identified as State's Exhibits 2-5. The parole officers testified that they conducted the search because (1) Garcia had offered to secure cocaine for an informant, (2) two parolees were living together contrary to department policy, and (3) two minor females were observed at the apartment. (T.27)

In determining whether the search was lawful, the court observed that parolees have a lesser expectation of privacy than do ordinary citizens. (T. 170) Therefore, if a search is based on "reasonable suspicion", a warrant need not be obtained prior to the search. (T. 171) The court held that the facts in this case showed a "reasonable suspicion", and relied on the three reasons articulated by the parole officers, and, in addition, the following factors, to buttress its ruling: that neither Garcia nor appellant was employed, that a homicide had occurred in the building, that Garcia had been connected with violent crimes in the past, and that appellant had been a witness to two homicides in New Mexico. (T.169) Regarding the issue of consent to search, the court found that neither appellant nor Garcia gave it, and, in any event, there was insufficient evidence to make a finding of what the "common areas" of the apartment were. (T. 157, 172)

Appellant argued and now asserts that either a warrant should have been procured, or special conditions of parole consistent with appellant's needs as a parolee should have been incorporated into a parole agreement so as to authorize necessary warrantless searches. (T. 160) Appellant's argument is supported by either of two emerging analyses in the case law. The first retains the warrant requirement, and the second adopts a "middle ground", which allows warrantless searches but imposes reasonable limitations thereon, most often in the form of articulated conditions of parole. Under either view, the search in the instant case was illegal, and the evidence seized should have been suppressed.

A. THE WARRANTLESS SEARCH WAS ILLEGAL SINCE THE STATE FAILED TO SATISFY ITS BURDEN OF SHOWING AN EXCEPTION TO THE WARRANT REQUIREMENT.

A warrantless search is per se unreasonable, "subject only to a few specifically established and well-delineated exceptions." Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973). And the burden is on those seeking an exception to the warrant requirement to establish the need for it. Coolidge v. New Hampshire, 403 U.S. 443 (1971). The State thus had the burden of showing that a "parolee exception" to the warrant requirement existed.

Well-reasoned opinions and cases have recently rejected a "parolee exception" to the warrant requirement, and hold that parolee searches must conform to standards articulated in the Fourth Amendment. The subject was treated in depth by Circuit Judge Hufstedler in the case of Latta v. Fitzharris,

521 F.2d 246, 254 (9th Cir. 1975) (dissenting opinion). There the majority held that a warrantless search of a parolee's home, subsequent to his arrest for possession of marijuana, was reasonable. The court found that if a parole officer decide a search is necessary he is entitled to conduct one. His decisi may be based only on a "hunch", but cannot be motivated by a desire to harass or intimidate the parolee. Judge Hufstedler, with two judges joining her, was unable to agree that a parole officer may search his parolee's residence, on a mere "hunch", without probable cause and without a warrant. She responded to the majority s three justifications for jettisoning the warrant requirement as follows.

First, she disagreed with the majority's propositions that requiring a warrant would reduce warrants to mere "paper tigers" and impair effective parole supervision. Rather, she pointed out that the probable cause requirement is organic in nature, and can be modified to accomodate the issuance of parolee search warrants. She noted that the developing case law in the area of administrative searches reflects a similar flexibility. For example, in Camara v. Municipal Court, 387 U.S. 523, 538 (1967), the United States Supreme Court disagreed that the issuing of warrants based on "area-wide" probable cause for dwelling violations would authorize "synthetic search warrants". The Court preferred to modify the traditional probab. cause requirement rather than dispensing with it altogether.

In fact, the court has dispensed with the warrant requirement in the area of administrative searches in only one narrow and limited situation. That is where a warrantless search may be made of business premises by licensed liquor or firearms dealers pursuant to statute or ordinance supported by detailed regulations. See United States v. Biswell, 406 U.S. 311 (1972); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970).

By contrast, parole searches are not conducted pursuant to statutory authority, nor are there regulations defining the limits of a parole officer's authority to search. Judge Hufstedler recognized that without such standards, particularly where the need to search varies with each parolee, a flexible warrant requirement is the most effective way to fulfill constitutional mandates without unreasonably restricting parole supervision. She observed that evidentiary support for the probable cause showing need not rise to the high standards of Aguilar-Spinelli,[1] but that it could not be based on a mere unsupported "hunch" of a parole officer. The magistrate would take into account the nature of the suspected parole violations, the extent to which persons other than the parolee would have their privacy invaded, and the existence of less intrusive means than a full-blown search to meet the parole officer's supervisory responsibilities.

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1. Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969).

Second, Judge Hufstedler rejected the majority's assertion that the parole officer's intimate and supportive relationship with the parolee is an adequate substitute for the warrant requirement, and enough to deter unreasonable searches. She acknowledged that while some parole officers maintain ideal relationships with their parolees, more often parole systems are characterized by inadequate training programs and burdensome workloads. A warrant requirement would prevent indiscriminate searches which undermine the rehabilitative process. Moreover, the warrant requirement does not deprive the parole officer of necessary tools to accomplish his goals. He or she may visit the parolee's home without procuring a warrant, and may, if necessary, conduct a search based on exigent circumstances, or seize evidence in plain view.

Third, Judge Hufstedler was not convinced that subsequent judicial review of the reasonableness of a search would protect the parolee's Fourth Amendment rights or deter future unreasonable searches. She persuasively argued that "the unarticulated majority rule is that all searches of a parolee's home by his parole officer are reasonable unless the particular search later is deemed to have been harassing, intimidating, or too overblown." Id. at 259. In effect this creates a presumption of reasonableness that may be dispelled only if the defendant can establish the unreasonableness of the search. Since the search ordinarily has produced incriminating evidence, the defendant's burden is heavy indeed. Thus, the burden that

constitutionally rests on the state to show an exception to the warrant requirement is effectively shifted to the defendant. Judge Hufstedler rightly concluded that the net result is to obliterate Fourth Amendment guarantees for parolees.

The Fourth Circuit has recently adopted Judge Hufstedler's position. In United States v. Bradley, 571 F.2d 787 (4th Cir. 1978) the court held that the warrantless search of defendant's room by his parole officer was in violation of the Fourth Amendment. In Bradley, the parole officer received phone calls from defendant's landlady informing him that defendant was in possession of a loaded firearm. Without securing a warrant (even though sufficient probable cause existed to secure one), the officer conducted a thorough search of the parolee's room. A firearm was seized, defendant's parole revoked, and a conviction under federal firearms law followed. The court reversed, finding that "Judge Hufstedler's well-reasoned dissent in Latta . . . represents the preferable approach," id. at 789, and therefore the parole officer was required to procure a search warrant.

The court discussed the Latta majority's reliance on the Biswell and Colonnade cases, supra, in which the Supreme Court held the warrant requirement to be inoperative, and found the reliance to be misplaced. The Bradley court said that Biswell and Colonnade represent narrow exceptions to the general warrant requirement, and are internally tailored by an authorizing statute or regulations. Administrative discretion to search a parolee is not regulated, however, either by statute or administrative

guidelines. Thus, in the absence of appropriate guidelines, the Bradley court was opposed to dispensing with the warrant requirement.

In addition, the Bradley court was unconvinced that a warrant requirement would disrupt the parole system. While the court was mindful of the important governmental interests at stake, it nevertheless preferred to modify the rigorousness of the probable cause standard rather than dispense with judicial protection that the warrantrequirement provides. The court agreed with Judge Hufstedler that "abuse of discretion is more easily prevented by prior judicial approval than by post hoc judicial review." (citation omitted) 571 F.2d at 790. See also United States v. Workman, 585 F.2d 1205 (4th Cir. 1978).

Several state courts have reached the same result. In State v. Cullison, 173 N.W. 2d 533 (Iowa, 1970) the court grappled with the issue of whether a parolee could challenge the evidentiary use of fruits obtained by a parole supervisor's warrantless, nonconsent search of his living quarters. In Cullison the parole officer went to the parolee's apartment to ascertain why the latter had not reported for work. The parole officer was aware that "break-ins" had occurred in the area, but was unaware of any facts connecting the parolee to them. When he found the parolee at home, he attempted to open a locked "interior door," and the parolee said he did not want the officer to go in there. The parole officer returned later with a policeman and without a warrant gained access to the room where he discovered stolen goods. The court held the search to be unreasonable

because it was not premised on probable cause.

A state parolee's Fourth Amendment rights, the court observed, is to be accorded the same recognition as any other person's. Absent an arrest-attendant search, or any other valid exception to the warrant requirement, the parolee's privacy cannot be invaded based solely on his status as a parolee. The court emphasized that where a parolee stands to be convicted of a new crime, as opposed to revocation of his parole, that conviction should be based on evidence seized pursuant to Fourth Amendment requirements. If it is based on a search and seizure lacking in probable cause, it denies the parolee equal protection of the law.

Similarly, the court in State v. Gansz, 297 So. 2d 614 (Fla. App. 1974), found that the fact that a defendant is a probationer[2] does not deprive him of his constitutional guarantee in the form of a search warrant. In Gansz, the probation officer received an anonymous phone call that the probationer had been dealing drugs from his house. An ensuing search of the parolee's residence uncovered marijuana. On pre-trial motion, the court suppressed the marijuana as the fruit of an illegal search

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2. Numerous cases have recognized that there is no significant difference between a probationer's rights and a parolee's rights under the Fourth Amendment. See e.g. Roman v. State, 570 P.2d 1235, 1237 n.3 (Alas. 1977); United States v. Consuelo-Gonzalez, 521 F.2d 359, 265 n.15, (9th Cir. 1975).

and seizure. Interlocutory appeal was taken by the state, and the appellate court affirmed, holding that the officers needed to secure a warrant before searching the premises. While the court refused to deny a probationer the right to Fourth Amendment guarantees, the court nevertheless acknowledged that a person's status as a probationer may be considered in the determination of whether there is probable cause for the issuance of a search warrant.

Most recently, in State v. Fogarty, 610 P.2d 140 (Mont. 1980), the court, relying in part upon its own state constitution squarely held that a search warrant based on probable cause must be obtained before a probationer's residence can be searched. In Fogarty one of the express conditions of defendant's probation provided for warrantless searches, yet the court found that such searches could be too intrusive, especially upon innocent third parties who live with the parolee. Therefore, the probation officer must have a "reasonable basis" to conclude that the probationer has violated his probation, and if relying on outside information must set forth in affidavit form the source and its reliability. In addition, the court imposed the requirement that the judge set reasonable limitations as to the time, place, and manner of the search.

In the instant case, the court found that the evidence was insufficient to support a finding of probable cause. (T.170) It was because of this insufficieny that Detective Voyles contacted Dennis Holm. He admitted that there was insufficient evidence to get a search warrant, so he was looking for other ways to gain access to the apartment. (T.8) It is precisely this kind of abuse which the warrant requirement seeks to avoid. A post hoc determination of reasonableness, as the court made here, in the face of incriminating evidence in a serious criminal case, simply fails to provide adequate protection for the parolee. The appellant was placed in the position of having to show that the search was capricious, or harassing or intimidating, or in some other way unreasonable. The burden is not only misplaced, it is insurmountable.

That the appellant had the burden of showing an unreasonable search is apparent from the bootstrapping technique of the state in amassing the factors supporting the reasonableness of the search. The only evidence of any substance whatsoever justifying the search was the information concerning an offer, not by appellant, but by Garcia, to sell cocaine on one occasion. (T. 143) The informant was undisclosed, and no evidence whatsoever of his or her reliability was produced. This was flimsy information on which to justify a full scale search. The other factors, the parolees living together, the presence of the juvenile girls, and the unemployment of the parolees, could have been effectively checked out by a routine visit. The court also lent

significance to the fact that appellant had witnessed two homicides in New Mexico. This was quite irrelevant, unless a parole officer is entitled to engage in all sorts of speculation to justify his search of a parolee. And the fact that a homicide occurred in the building certainly doesn't authorize complete searches of all parolees in the vicinity, no more than "break-ins" in the area authorized the parole officer in Cullison, supra, to search the parolee's premises.

Clearly, the only arguable justification for the search was the information regarding Garcia's offer to sell cocaine. It may be that with a flexible probable cause requirement, and a showing as to the reliability of the informant, such information would have justified the issuance of a warrant. In any event, that determination should have been made by the judge, and not by a parole officer at the behest of a police officer seeking to enhance his investigatory alternatives. Appellant submits that the better rule requires a parole officer to procure a search warrant before conducting a search of his parolee's premises, and asks this court to reverse the trial court's ruling that such a warrant is unnecessary.

B. THE SEARCH WAS UNREASONABLE EVEN IF THIS COURT ADOPTS THE WARRANTLESS, "MIDDLE-GROUND" APPROACH.

While some courts have not extended the warrant requirement to searches and seizures of parolees, neither have they been inclined to adopt the loose "hunch" test articulated in Latta v. Fitzharris, 521 F. 2d 246. Instead, they utilize a "middle ground" approach to the area of parole search and seizure that offers a compromise; that is, warrantless searches are acceptable only if they are carefully circumscribed. Decisions range from the requirement that a warrantless search is proper only if articulated specifically in the terms of parole, to the requirement that searches conducted pursuant to an informer's tip-off can only be reasonable if the informant is shown to be reliable.

Several well-reasoned cases stand for the proposition that a probationer or parolee retains all civil liberties except those which are taken away as specific conditions of probation. In State v. Culbertson, 563 P.2d 1224 (Or. App. 1977), a probation officer received information from a police officer that defendant had about 50 pounds of marijuana in his house. Lacking sufficient reliable evidence to obtain a search warrant, the probation officer and a policeman proceeded to the probationer's residence where they conducted a cursory search. They observed "remnants of marijuana", and were then able to procure a search warrant. Upon execution of the warrant, marijuana was discovered and the defendant's probation was revoked.

In discussing whether or not the initial search was constitutionally permissible, the court rejected an absolute warrant requirement, and found the Latta rule authorizing the invasion of the parolee's privacy for probation-related purposes to be equally distasteful. The court observed that the Latta rule would allow the decision to search to be completely executive rather than judicial, and thus contrary to the intent of the Fourth Amendment. On the other hand, the view that Fourth Amendment rights are unaffected by probation ignores legitimate supervisory needs of the probationer. Consequently, the court concluded it would adopt what it called "the middle way", and allow warrantless searches only where a specific condition in a defendant's probation so authorizes. Since the defendant's conditions of probation failed to disclose any special requirements affecting his expectation of privacy, and the entry was not based on probable cause, the fruits of the search were inadmissible.

Similarly, the court in State v. R. H., 406 A.2d 1350 (N.H. Juv. & Dom. Ct. 1979), rejected the State's claim that a juvenile, R.H., lost her Fourth Amendment rights when she became a probationer. The court observed that the mere "status" of probationer does not work a forfeiture of such guarantees; however, the incorporation of specific conditions in the probation agreement may well have such an effect. But the condition must be specific enough to clearly and positively inform the

probationer of the nature of the forfeiture. The fact that R.H. signed a statement acknowledging general rules and conditions of probation was not enough. The court thus suppressed the evidence found in the unlawful search.

In Roman v. State, 570 P.2d 1235 (Alas. 1977), the Supreme Court of Alaska was asked to determine the nature and extent of a parolee's rights under the Fourth Amendment of the United States Constitution and the parallel provision in the state constitution. The court held that a parolee is entitled to the same protection as an ordinary person unless a reasonably conducted search is required by legitimate demands of correctional authorities[3] and is set forth as a condition of parole by the Parole Board. The court felt that the Parole Board is in the best position to specify when and under what circumstances searches are permissible. The court declared:

> [W]e believe that conditions of parole authorizing searches should be specified by the Parole Board [and imposed by the judge, who would rule on proposed charges] and not left to the discretion of individual parole officers. [footnote omitted] This procedure will afford parolees some of the protections accorded others before issuance of search warrants, without burdening parole authorities with the requirement of securing warrants for each search. Id. at 1244.

This guarantee of due process, according to the court, ensures that the parolee is protected from undue harassment.

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3. A warrantless search provision in a parole agreement is not carte blanche to search without restriction. The search must be related to the parole officer's duty to detect and prevent parole violations. See People v. Mackie, 430 NYS 2d 733 (App. Div. 1980).

While the courts are willing to allow warrantless searches pursuant to specified conditions of probation or parole, they are wary of sanctioning "boiler-plate" search provisions. For this reason, the vast majority have imposed an additional requirement that there exist a reasonable relationship between the parolee's underlying offense and the condition of parole.[4] Thus, in the Roman case, the court noted that a warrantless search provision might be permissible in the case of one convicted of a drug offense or an offense involving stolen property, to ensure that such activities have ceased. But such a provision in the case of one convicted of manslaughter while recklessly driving would not be permissible.

The court in Sprague v. Alaska, 590 P.2d 410 (Alas. 1980) found a probation condition to be inappropriate. There Sprague pleaded nolo contendere to a charge of Burglary and was placed on probation. A condition of his probation was that, upon request of a probation officer, he submit himself and his property to a search for the presence of narcotics or dangerous drugs. Despite Sprague's admissions of "drug contacts" in the presentence report, the court found an insufficient nexus between the underlying offense and the condition of probation. The court observed:

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4. United States v. Consuelo-Gonzalez, 521 F.2d 259 (9th Cir. 1975); Porth v. Templar, 453 F.2d 330 (10th Cir. 1971); Roman v. State, 570 P.2d 1235 (Alas. 1977); Seim v. State, 590 P.2d 1152, 1156 (Nev. 1979) ["special condition of probation was clearly related to appellant's prior criminal conduct. . ."]; This standard is consistent with ALI Model Penal Code Section 305.13(j) (Proposed Official Draft, 1962), and ABA Project on Standards for Criminal Justice, Standards Relating to Probation, 32 (Approved Draft, 1970).

> If we were to uphold the probation condition in this case, in effect, we would be opening up virtually all classes of offenders to warrantless searches on less than probable cause. Id. at 418.

In the instant case, the state failed to introduce any evidence regarding conditions, whether standardized or specific, that were imposed on Garcia and/or appellant. In Utah, the Board of Pardons is authorized to adopt general conditions under which parole shall be granted and revoked, and the defendant must sign a certificate specifying the conditions of parole when he is released. See Utah Code Ann. Section 77-62-7 (1953 as amended), new provisions Section 77-27-7 (1980); Utah Code Ann. Section 77-62-15 (1953 as amended), new provisions Section 77-27-15 (1980). No evidence of any certificate was produced by the state with reference to either Garcia or appellant, and the prosecutor specifically stated that he didn't think any standard consent agreement existed. (T. 96) Utah granted appellant compact supervision from New Mexico, but appellant did not sign a Utah parole agreement, nor were any terms and conditions spelled out for him. (T. 133) Therefore, neither Garcia nor appellant should have suffered the loss of any constitutional rights where no conditions of probation specifically removed those rights.

Even if certain conditions could be implied, (although the prosecutor specifically stated he was not relying on an implied consent theory, T. 99) the state failed to show that the conditions were reasonably related to the underlying offense.

> We find that the parole officers here were not seeking to ascertain proof of a parole violation, but rather were acting as agents of the police, thereby enabling the police to circumvent constitutional requirements. Id. at 786.

Similarly, in the instant case, the search by the parole officers enabled the police to circumvent constitutional require Adult Probation and Parole was contacted by Detective Voyles regarding the homicide. Detective Voyles specifically asked Dennis Holm about the guidelines regarding searches of parolees. (T.6) He told Holm it would be "beneficial for [his] department" to conduct a search of Apt. 3, the apartment occupied by Garcia and appellant. (T.7) He admitted he was looking for other ways to gain access to the apartment since he didn't have sufficie evidence to obtain a search warrant. (T.8) Moreover, Holm admitted that Voyle asked him to make a search of the apartment, but then insisted that the search was conducted for entirely different reasons. (T.38) A realistic appraisal of the evidence in this case leads to the conclusion that the parole officers were acting as agents for the police in order to find incriminati evidence regarding the homicide. As the Candelaria court noted:

> [A] parolee's status ought not to be exploited to allow a search which is designed solely to collect contraband or evidence in aid of the prosecution of an independent criminal investigation. Id. at 786.

It is clear that the parole officers were not seeking to ascertain proof of a parole violation, but rather were exploiting the "parolee status" of both men in order to aid in the investiga of the homicide.

The second factor discussed by courts which is pertinent in this fact situation is the nature of the information relied upon by the parole or probation officers to justify the search. In State v. Simms, 516 P.2d 1088 (Wash. 1974) the court held that before a parole officer may forcibly enter a parolee's residence without a warrant, on the tip of an informer, the tip must carry some indicia of reliability to support an inference that the informer is telling the truth. Similarly, in People v. Jackson, 385 NE 2d 621 (N.Y. Ct. App. 1978) the court held that, while the probation officer was under a duty to investigate an anonymous complaint against the defendant, he nevertheless acted unreasonably in conducting a wholesale search of defendant, his locker, and his automobile. The court noted that the probationer had not previously been an unreliable probation risk, that the source of information could not be assessed, and that other ways existed for checking out the complaint.

In the present case, no evidence was offered concerning the identity of the informant, nor was any evidence offered concerning the facts or circumstances from which the informant concluded that Garcia had offered to make a sale of cocaine. The basis of the tip here may have been nothing more than a casual rumor, or worse, a fabrication offered by the parole officers to justify the search. In any event, it is not enough to support a well-founded suspicion that a parole violation occurred See State v. Simms, at 1094.

It was error for the trial court to deny appellant's motion to suppress the fruits of the search of Apt. 3. Appellant was entitled to the protection of the Fourth Amendment the same as an ordinary person in the absence of any valid conditons waiving his right to be free from unreasonable searches and seizures. Furthermore, there was substantial evidence that the search was little more than a subterfuge for a criminal investigation. And lastly, even if the search was conducted in order to detect possible parole violations, the information advanced to justify the search was unreliable.

POINT II

APPELLANT DID NOT RECEIVE A FAIR TRIAL DUE TO CUMULATIVE ERROR WHICH OCCURRED DURING THE COURSE OF THE TRIAL.

Numerous errors occurred during the course of the trial. Independently, some of these errors may not have been prejudicial enough to warrant reversal. Nevertheless, the cumulative impact of the errors was to preclude appellant from presenting an effective defense and obtaining a fair trial. See State v. St. C[illegible] 282 P.2d 323 (Ut. 1955).

A. TWO WITNESSES FOR THE PROSECUTION VIOLATED THE COURT'S ORDER REGARDING THE EXCLUSIONARY RULE.

Section 78-7-4, Utah Code Ann., 1953 as amended, provides:

> RIGHT TO EXCLUDE IN CERTAIN CASES. --In an action of divorce, criminal conversation, seduction, abortion, rape, or assault with intent to commit rape, the court may, in its discretion, exclude all persons who are not directly interested therein, except jurors, witnesses and officers of the court; and in any cause the court may, in its discretion, during the examination of a witness exclude any and all other witnesses in the cause.

Upon the commencement of trial, counsel for appellant asked that the exclusionary rule be invoked and the court granted this request. (T. 50,51)

Towards the end of the trial, Detective Robert Gillies testified for the prosecution. (T.671) On cross-examination he admitted that he had discussed Officer Voyles' testimony with him just before he (Gillies) took the stand. (T. 681) Specifically, Detective Gillies stated that Detective Voyles told him that he (Voyles) had testified that it was a twenty minute drive from the place of arrest (of Brenda Valentine) to the police station (T. 683), and that Brenda Valentine had been drinking. (T. 684) Counsel for appellant subsequently motioned for a mistrial on the basis that the two officers had clearly violated the exclusionary rule. (T. 688) The court agreed that the conduct constituted a violation of its order, but ruled that Gillies' testimony was not prejudiced by his conversation with Voyles. (T. 689)

The law is settled in Utah that a decision as to whether a violation of the exclusionary rule warrants the declaration of a mistrial is within the sound discretion of the trial court. State v. Dodge, 564 P.2d 312 (Utah 1977). In State v. Carlson, Nos. 16582, 16583 (July 31, 1981), defendant claimed error by the trial court's failure to strike testimony offered by police officers establishing a chain of custody. During the trial, the court was advised that over the noon recess the prosecutor

had called the officers into his office to discuss the chain of custody of the evidence. Such a discussion constituted a violation of the exclusionary rule. This court held that the defendant failed to show prejudice by the violation of the rule, and thus, the trial court did not abuse its discretion in failing to strike the testimony.

Other courts apply the same standard, but suggest that certain factors be considered in deciding whether to admit or exclude the witness' testimony where the witness has violated the exclusionary rule. For instance, in State v. Barboa, 506 P.2d 1222 (N.M. 1973), the court advised that the trial court consider whether the witness' violation was deliberate or inadvertant or whether the violation was condoned by counsel. Id. at 1224.

In the instant case, both Detective Voyles and Gillies were (and are) experienced police officers. Detective Voyles testified that he had 13 years experience with the Salt Lake City Police Department. (T. 245) It could hardly be said that the officers' conversation in violation of the exclusionary rule was "inadvertant". The court clearly found the violation to be error, and considered contempt of court proceedings. (T. 688) However, the court's final ruling was that no prejudice inured to appellant as a result of the violation. Appellant asserts that even if no actual prejudice can be shown by the officers' violation of the court order, the error, combined with other errors occurring during the course of the trial, entitles him to a reversal and a new trial.

B. TWO JURORS VIOLATED THE COURT'S ADMONITION TO AVOID TRIAL PUBLICITY BY READING NEWSPAPER ARTICLES CONCERNING THE CASE.

Before the court recessed for the weekend, it admonished the jurors to ignore all press reports concerning the case. (T.586) Over the weekend, a number of news reports were released which discussed the progress of the case. (T. 588) On Monday, in an effort to ascertain whether any of the jurors had been exposed to the reports, the court interviewed each juror individually. (T. 588-608) Two of the jurors, Mrs. Zabriskie (T. 596) and Mrs. Bancroft (T. 601) had read news articles about the case. On the basis of this misconduct, counsel for appellant motioned for a mistrial. (T. 608) The court acknowledged that the jurors were wrong in failing to follow the instructions of the court, but held that no prejudice was shown, and denied appellant's motion. (T. 611)

It is beyond question that a defendant is entitled to a fair and impartial trial, free of sensational publicity which has the effect of trying and convicting the accused in the eyes of the public. Sinclair v. Turner, 434 P.2d 304 (Utah 1967). On the other hand, the public has an interest in obtaining information of public concern, and in promoting freedom of speech and of the press. Id. The latter interest, however, is modified as it applies to a jury sitting for a particular case, and jurors are frequently admonished to refrain from reading and watching news reports concerning their case. The court in People v. Lessard, 375 P.2d 46, 49 (Cal. 1962), expressed the general principle as follows:

> There can be no doubt that the reading by jurors of newspaper accounts of a trial in which they are engaged amounts to a violation of their duty and obligation and if such newspaper accounts would be at all likely to influence jurors in the performance of duty, the act would constitute a ground for a motion for a new trial.

Whether or not exposure to media accounts of a case is sufficient to warrant reversal lies within the discretion of the trial court. State v. Andrews, 574 P.2d 709 (Utah 1977). The court must determine whether the exposure either actually or probably prejudiced the jury. Sheppard v. Maxwell, 384 U.S. 333 (1966). See also, State v. Knapp, 540 P.2d 898 (Wash. 1975). Utah apparently adheres to this standard as well. See State v. Andrews, 574 P.2d at 710, ["Defendant did not show any actual juror bias as a result of improper publicity nor did he show that the publicity was inherently prejudicial."]; State v. Andrews, 576 P.2d 857 (Utah 1978), [defendant must show "actual prejudice" or a "substantial likelihood" that prejudice resulted from refusal to sequester jury].

In the instant case, both jurors stated to the court that their exposure to the newspaper articles would not influence their ability to render an impartial verdict. Thus, the court concluded no actual prejudice was shown. Even if no actual prejudice can be shown, there nevertheless existed some probability that the information contained in the articles influenced the jurors. In light of this potential for prejudice, and other errors occurring at trial, the appellant was denied his right to a fair and impartial jury trial.

C. THE COURT IMPROPERLY RESTRICTED APPELLANT'S CROSS-EXAMINATION OF AN EXPERT WITNESS.

At trial the state qualified Bill Simpson as a fingerprint expert and elicited testimony regarding the procedures employed by him in lifting fingerprints from the deceased's bedroom wall and comparing them to appellant's prints. (T. 350, 354, 361) On cross-examination, defense counsel asked the expert whether he measured the distances between the points of comparison. (T. 369) The expert admitted that he made no such measurements since he didn't have a "one to one reproduction", and acknowledged that such a procedure is common in comparing prints. (T. 369) Defense counsel then attempted to ascertain what effect variances in distances between the points of comparison might have on the reliability of the print comparison. (T. 369-370) The state objected and the court terminated this line of questioning on the basis that defense counsel couldn't ask "hypothetical questions that contain facts that are not in evidence". (T. 371) Appellant asserts that the trial court erred in restricting defense counsel's attempted cross-examination.

This court has set out the standard for cross-examination of an expert witness in State v. Jarrell, 608 P.2d 218 (Utah 1980). There the court stated that an expert may give an opinion based on reasonable possibilities within the factual and legal issues in the case, but may not give an opinion based purely on speculation. Id. at 231. Thus, an expert may render an opinion using words like "might have" or "could have", so that the conclusion "fits the relative degree of certainty to which

the opinion is entitled." Id. This gives defense counsel the "ample elbowroom" which he "must be allowed" in conducting cross-examination. Id. at 230.

Allowing substantial latitude in the cross-examination of an expert clearly comports with the policies behind the adoption of Rule 58 of the Utah Rules of Evidence. That rule provides:

> HYPOTHESIS FOR EXPERT OPINION NOT NECESSARY. Questions calling for the opinion of an expert witness need not be hypothetical in form unless the judge in his discretion so requires, but the witness may state his opinion and reasons therefor without first specifying data on which it is based as an hypothesis or otherwise; but upon cross-examination he may be required to specify such data.

Since the expert need not specify the data forming the basis of his opinion on direct examination, the cross-examiner must have free reign to vigorously test and expose any weaknesses in the foundation of the expert opinion. Oregon adopted Rule 58 as well, and the court in Samuel v. Vanderheiden, 560 P.2d 636, 639 (Ore. 1977) discussed the shifting of responsibility to the cross-examiner under the rule:

> "* * * The premise of the new rule is that defective or prejudicial examinations of an expert witness can be corrected on cross-examination. * * *
>
> "The means available to opposing counsel to discredit an expert opinion based on a one-sided interpretation of evidence are rather limited. He must demonstrate to the jury on cross-examination that a change in the facts which the expert assumes to be true necessitates a modification of the opinion, and then later in closing

> argument he must suggest that the jury should not give the opinion great weight. * * *" [citing Wulff v. Sprouse-Reitz Co. Inc., 498 P.2d 766 (Ore. 1972), and Comment, Opinion Testimony of Expert Witnesses: Oregon's New Rule, 52 Or. L. Rev. 443 (1973)]

Other cases have also emphasized the importance of allowing great latitude in the cross-examination of an expert witness. In Timsah v. General Motors Corp., 591 P.2d 154, 164 (Kan. 1979), the court held that it was proper to allow experts to be questioned on other possible causes of hose defects, and stated:

> Great latitude is necessarily indulged in the cross-examination of an expert witness in order that the intelligence and powers of discernment of the witness, as well as his capacity to form a correct judgment, may be submitted to the jury so it may have an opportunity for determining the value of his testimony. (citation omitted)

In State v. Hull, 578 P.2d 434 (Ore. 1978) the court noted that cross-examination of an expert witness is a formidable task and the cross-examiner must therefore be able to test adequately the basis of the opinion. The court stated:

> It is proper to test by questions to the expert the factual data used in arriving at a conclusion and equally proper to elicit from the witness that she was unaware of relevant facts that may affect the opinion. Id. at 437.

And in State v. Bell, 560 P.2d 925 (N.M. 1977), defense counsel objected to a hypothetical question propounded to the expert on the basis that (1) the witness did not know what reagent was used in a sperm test, (2) there was no evidence to support the witness' opinion as to the method of obtaining the count of acid phosphatase and (3) there was no testimony upon which the

witness could base his opinion as to other possible contributing factors to the acid phosphatase count. The court held that the expert was properly permitted to answer, and that any objection by defendant went to the weight, rather than the admissibility, of the evidence.

In the instant case, defense counsel's attempted cross-examination of Mr. Simpson should have been allowed for a number of reasons. First, the jury was entitled to know what relevant information was not available to or considered by the expert in arriving at his opinion just as it was entitled to know what information was available. Second, counsel was entitled to test out the factual data relied on by the expert, and thereby expose weaknesses in it. Third, counsel should have been allowed to show that a change in the facts assumed by the expert might necessitate a change in his opinion.

The expert clearly assumed that there were no variances in the distances between the points of comparison. If adequate measurements had been taken, variances might have been apparent, and a change of opinion might have been necessary. Counsel was therefore entitled to question the witness as to the relevancy and impact of possible variances in measurement between the comparison points. Since counsel was prohibited from fully testing the reliability of Mr. Simpson's conclusions, he was unable to challenge the expert's competency and the weight to be accorded his opinion. This was error and denied appellant

"ample elbowroom" in cross-examining the expert. Jarrell, supra.

D. THE COURT ERRED IN FAILING TO STRIKE PORTIONS OF IMPROPER HEARSAY TESTIMONY ELICITED FROM TWO STATE WITNESSES.

On December 6th, Brenda Valentine made statements to officers Voyles and Gillies at the police station implicating appellant in the homicide. (T. 650, 671-2) At trial, on direct examination, she admitted that she had lied to them. (T. 529) Subsequently, the state called both officers to the stand and elicited testimony regarding the substance of Brenda's December 6th statements. Defense counsel, while failing to object to this testimony when it was offered, later made a motion to strike it on the basis that it was hearsay. (T.710) Counsel argued that it was inadmissible as a prior inconsistent statement inasmuch as Brenda admitted that she had lied when she took the stand. (T. 710)

The court denied the motion and agreed with the state that portions of the testimony were admissible as exceptions to the hearsay rule under Rule 63(1) of the Utah Rules of Evidence. That section provides:

> (1) Prior Statements of Witnesses. A prior statement of a witness, if the judge finds that the witness had an adequate opportunity to perceive the event or condition which his statement narrates, describes or explains, provided that (a) it is inconsistent with his present testimony, or (b) it contains otherwise admissible facts which the witness

to set aside a stipulation entered into inadvertently or for justifiable cause."] No Utah authorities have been discovered by the author that deal with the avoidance of stipulations in a criminal context. However, there seems to be no reason to distinguish between criminal and civil cases. The standard articulated above, therefore, should be applicable in the instant case.

The prosecutor in this case entered into a stipulation with defense counsel knowing full well what issues would be presented at trial. Appellant acknowledges the fact that Brenda's confession was a new development during trial. Nevertheless, the cause of death, and the circumstances surrounding the death, as shown by the position of the body on the bed, were in issue from the beginning. Absent "mistake" on the prosecutor's part, on some other justifiable cause, the court should not have allowed the prosecutor to renege on his stipulation. While this error was probably not independently prejudicial, it nonetheless necessitates reversal when combined with other errors at trial.

CONCLUSION

Appellant is entitled to a new trial for two reasons. First, the trial court erred in failing to suppress fruits of an illegal seizure of evidence obtained from a warrantless search of the residence of parolees. Second, appellant did not get a fair trial due to cumulative error which occurred throughout the trial. He respectfully asks this court, therefore, to reverse his conviction and grant him a new trial.

Respectfully submitted this 9 day of September, 1981.

LYNN R. BROWN
Attorney for Appellant

I hereby certify that a copy of the foregoing was delivered to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah 84114 this_____day of September, 1981.

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